



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
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Sue Lockwood

SEP 26 2013

New Jersey Wetlands Mitigation Council
New Jersey Department of
Environmental Protection
Mail Code 501-02A
PO Box 420
Trenton, New Jersey 08625-0420

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SEP 26 2013
EPA REGION 2

Subject: New Jersey's In-lieu Fee Program

We are writing to inform you that the current operation of the New Jersey Wetlands Mitigation Bank, operated by the Wetlands Mitigation Council, does not meet the in-lieu fee mitigation requirements of the federal Compensatory Mitigation Rule (40 CFR §230). The federal mitigation rule issued jointly by EPA and the Army Corps of Engineers went into effect on June 9, 2008. This rule consolidated existing federal regulations and guidance and established standards for mitigation under the federal regulatory program. Since this rule went into effect, EPA has worked with the NJ Department of Environmental Protection (NJDEP) to ensure that its mitigation provisions met the stringency standards required under EPA's state transfer regulations for a state-assumed Section 404 program. We are bringing this matter to your attention now because NJ's in-lieu fee program falls under the purview of the Mitigation Council.

The federal state transfer regulations (40 CFR §233) direct EPA to ensure that an approved state program shall, at all times, be conducted in accordance with the requirements of the Clean Water Act. While States may impose more stringent requirements, they may not impose less stringent requirements for any purpose. New Jersey accepted the conditions of the state transfer regulations when it sought and received approval to assume Section 404 authority. As an approved state program, New Jersey also acquired the responsibility to revise their state program when modification to the federal program rendered New Jersey's program less stringent. When the federal mitigation regulations took effect, they provided up to five (5) years for existing qualifying in-lieu programs to make necessary adjustments. Currently, New Jersey's Freshwater Wetland regulations governing monetary contributions do not meet the minimum federal stringency requirements required by the State Transfer Regulations for an assumed Clean Water Act Section 404 program.

There are two substantive deficiencies with NJ's in-lieu program, both of which need to be addressed immediately with modifications to the program. The first is the delay between when money is collected for impacts and when compensatory mitigation projects are implemented. Currently, it appears that more than \$2 million was collected over 3 years ago but has not been spent. Such delays in using the Mitigation Bank funds results in additional temporal losses of aquatic resources. The federal mitigation rule requires that land acquisition and physical and biological improvements for in-lieu fee compensatory mitigation projects be completed by the third full growing season after money is collected. In this regard, New Jersey's Wetlands Mitigation Fund does not meet the stringency standard of the federal rule. To remedy this, the Council must adopt a more timely process to fund eligible projects with the accumulated funds consistent with the federal standards.

The second deficit that must be addressed is the need for a "Compensation Planning Framework" which is required for all in-lieu fee programs under the federal rule. This is essentially a watershed plan and must include an analysis of historical aquatic resource losses as well as current conditions, a description of the general amounts, types and locations of aquatic resources the program intends to provide, and a prioritization strategy for selecting and implementing compensatory mitigation activities. The purpose of this provision is to ensure that in-lieu fee programs select and design successful projects and accurately estimate full project costs. In order to maintain an in-lieu fee program under New Jersey's state-assumed program, New Jersey must have a framework in place which meets the minimum standards described in the federal regulations. The federal Compensation Planning Framework is described at 40 CFR §230.98(c).

In order to bring New Jersey's in-lieu fee program up to federal standards, we request that the Wetlands Mitigation Council submit a revised in-lieu fee program description to EPA for review and approval. This instrument should generally follow the procedures set forth for mitigation banks and in-lieu fee programs at 40 CFR §230.98. Because the state transfer regulations require EPA to oversee the state's program to assure that NJ is operating a program that is as stringent as the federal program, EPA must determine whether the in-lieu mitigation bank meets federal requirements. Therefore, we will generally assume the role of the Corps District Engineer described within these procedures. Similarly, the Council should approach proposed changes to its Wetlands Mitigation Bank as if it were an in-lieu fee instrument as described in the federal regulations. NJDEP recently provided EPA with a draft in-lieu fee framework (attached) that explores several alternatives for meeting the federal stringency requirements. EPA can also provide the Council with examples of in-lieu fee instruments approved under the federal mitigation rules. Finally, my staff is available to consult with you and to answer any questions that you may have regarding this matter.

We request that the Wetlands Mitigation Council respond within 30 days of the date of this letter with a proposed plan that will lead to making the necessary adjustments required to address the federal stringency requirements for wetlands mitigation.

Thank you for your attention to this matter. Please contact Daniel Montella of the Wetlands Protection Section at (212) 637-3801, if you should require any additional information, or have any further questions regarding this matter.

Sincerely,

A handwritten signature in dark ink, appearing to read "Joan Leary Matthews", written in a cursive style.

Joan Leary Matthews, Director
Clean Water Division

Enclosure

cc: S. Lockwood. NJDEP, Trenton, NJ

State of New Jersey—In Lieu Fee Framework

Purpose

In 1987, the New Jersey Freshwater Wetlands Protection Act (N.J.S.A. 13:9B-1 et seq.) established the Wetlands Mitigation Bank. The Wetlands Mitigation Bank is a fund governed by the Wetland Mitigation Council (Council) that is set up to receive contributions when an applicant has no reasonable alternative wetland mitigation options (see N.J.S.A. 13:9B-14 and 15). The fund and the Council were intended to act like today's Federal "in lieu fee" mitigation programs. Since 1989, the Council has successfully received contributions in lieu of mitigation. However, the Council can only provide on-the-ground mitigation when government or non-profit entities provide a project worthy of funding to the Council. As a result, the Council has accumulated significant funds which exceed proposals for on-the-ground mitigation project. Hence, the State of New Jersey would like to present a draft prospectus for In Lieu Fee program, which would align the New Jersey wetlands mitigation program with the Federal In Lieu Fee rules (33 CFR Part 332)

The State of New Jersey, Department of Environmental Protection (Department) wishes to establish an in lieu fee (ILF) program with the following goals:

1. To provide mitigation in all areas of the State for which money has been collected but not yet spent by the Council;
2. To provide a third-party compensatory mitigation option for unavoidable impacts to waters of the United States approved by the State of New Jersey under its assumed wetlands program;
3. To provide a third-party compensatory mitigation option for enforcement actions approved by the State of New Jersey under its assumed wetlands program; and
4. To align the New Jersey mitigation program with the Federal In Lieu Fee rules (33 CFR Part 332).

I. Program Service Areas

The State of New Jersey's ILF will be an available mitigation option in assumed waters only (see Appendix 1). The State will be divided into 6 service areas, which are loosely based on eco-regions representing multiple HUC 8 watershed management areas (WMAs). The Department determined that eco-regions were appropriate because they encompass ecologically similar wetland types. In addition, the regions incorporate and distribute somewhat evenly, the watershed management areas where the Council has accumulated funds (see Appendices 2A-C and 3). The proposed ILF is for assumed waters only since those are the waters over which the State has sole jurisdiction.

The proposed Service areas are as follows:

Kittatinny Mountain, Ridges and Valley: Comprised of WMA 1 and 2.

NJ/NY Highlands: Comprised of WMA 3 and 6.

NJ/NY Piedmont: Comprised of WMA 4, 5, and 7.

Reading Prong/Northern Piedmont Lowland: Comprised of WMA 8, 9, 10, 11.

Outer Coastal Plain: Comprised of WMA 12, 13, 14, 15, and 16.

Inner Coastal Plain: Comprised of WMA 17, 18, 19, and 20.

II. Identification of Potential ILF Sponsors

a. The Division of Land Use, Mitigation Section, will be working with Green Acres, the Natural Resource Restoration Office, State Parks and Forestry, State Fish and Wildlife, the Natural Lands Trust and any other Department programs, to identify potential in lieu fee sponsors and projects throughout the State. The Department will also work with the Green Acres program to develop a slate of characteristics to be used to identify properties with the potential for mitigation in the eco-regions lacking projects. Once identified, the Department will work with the owners or managers of those properties to establish an in lieu fee. The Department's Natural Resource Restoration Program has the ability to contract and undertake on-the-ground mitigation and restoration projects and will assist with the technical aspects.

b. In addition, the State of New Jersey will prepare a Request for Proposal to seek third party ILF sponsors (sponsor). The request will seek non-profit and government entities to provide an ILF for any one, or multiple, eco-region service areas as defined above. Each sponsor will be invited to develop one or more projects and would be responsible for developing and managing each project.

III. Selection of projects for funding

A. Specific mitigation plans will be developed for each project and implemented in accordance with 33 CFR 332.4 and will include the following elements:

1. Project objectives
2. Site selection factors
3. Site protection instrument
4. Baseline information
5. Determination of costs
6. Determination of credits
7. Work plan
8. Maintenance plan
9. Performance standards
10. Monitoring requirements
11. Long-term management plan
12. Adaptive management plan
13. Long-term funding mechanism

Specific projects will be reviewed using the current Department/Freshwater Wetlands Mitigation Council process. That is, the Department will receive the project proposal from the sponsor for

review, and will provide comments and recommendations to the Wetlands Mitigation Council. The Council, with the Department's recommendations, will determine whether the project has merit and determine whether or not to fund the project in its entirety or to provide seed money for design and engineering of the project. This will constitute "conceptual approval" until the mitigation plan is fully developed in accordance with IV(B) below.

B. Funding Process

The funding process will be two pronged:

1. As long as there is money in the Mitigation Fund, the Department may recommend full funding of acceptable projects. However, in order to determine whether the funds requested are reasonable, the project will be assessed to determine the number of ILF credits that would result, using the same ratios that are used for all mitigation projects. The monetary request will be compared to credit cost so that the costs associated with producing those credits can be assessed. Currently, applicants provide cost estimates for projects that come before the Council but there is no "conversion" into credits. Determining the number of credits is needed to ensure that the wetland impacts for which the funds have been previously deposited are entirely mitigated. Conversion of projects into credits provides a baseline measurement on which different types of mitigation projects can be comparably assessed.

The Department or the Council may instead of recommending full funding, determine that seed money is more appropriate and that the project can be established as a more traditional in lieu fee qualified to sell credits to those coming to the Council with future contributions.

2. When there is no money in the Mitigation Fund for a specific service area, the Department together with the Council will establish the total number of credits for the project and then determine the number of advance credits to be released to facilitate the project in accordance with the federal rules.

IV. ILF Project Development

This section identifies the general framework under which individual ILF projects will be developed and managed. All projects seeking funding will be established as an ILF project.

A. Project Site Selection

The ILF sponsor will work with the Department to identify project sites suitable for wetland projects. For each site, the Department will require a qualitative assessment of the existing conditions including soils, hydrology, and vegetation and an assessment of the opportunities onsite to restore, create, enhance or preserve freshwater wetlands. Examples of characteristics the Department will consider when determining suitability of a site include, but are not limited to, evidence of historic hydric soils, potential for removal of previously placed fill, opportunities for habitat connectivity with undisturbed areas and correction of an existing erosion or flooding issues.

1. Watershed conservation priorities: Projects will be prioritized based upon a comprehensive

regional environmental management approach.

2. Ecological Uplift: Sites will be evaluated based on their potential to address multiple functions and services which may include improvement of fish and wildlife habitat, support for endangered or threatened species, flood attenuation, and water quality improvement values.

3. Site conditions: As stated above, sites will be evaluated for evidence of historic hydric soils, potential for removal of previously placed fill, opportunities for habitat connectivity with undisturbed areas and correction of existing erosion or flooding issues. Projects with greater "ecological uplift" per dollar will be given preference.

B. Mitigation Plan

The ILF sponsor will develop a mitigation plan for each accepted site following the Departments' mitigation banking checklist (attached as Appendix 4). The final plan will be submitted to the Department for review and approval.

C. Ecological Performance Standards

The Department will apply the same performance standards to the ILF sites that are currently used for wetland mitigation banks and stand-alone mitigation projects. Such standards include requirements that:

1. The goals of the wetland mitigation project, including acreage and the required transition area, as stated in the approved wetland mitigation proposal, have been satisfied. The manager shall submit a field wetland delineation of the wetland mitigation project based on the Federal Manual for Identifying and Delineating Jurisdictional Wetlands (1989) which shows the exact acreage of State open waters, emergent, scrub/shrub and/or forested wetlands in the mitigation area after the mitigation project has been implemented;
2. The site has an 85 percent survival and 85 percent area coverage of the mitigation plantings or target hydrophytes, which are species native to the area and similar to those proposed in the mitigation planting plan. All plant species in the mitigation area must be healthy and thriving and all trees must be at least five feet in height;
3. The site is less than 10 percent coverage by invasive or noxious species.
4. The site contains hydric soils or there is evidence of reduction occurring in the soil; and,
5. The proposed hydrologic regime as specified in the mitigation proposal has been satisfied.

D. Project Approval and Instrument Modifications

Upon approval by the Department of a mitigation project site, an ILF instrument shall be developed. A standard template based upon the State's mitigation banking template (see Appendix 5) and the Federal rules (33 CFR 332.8) will be developed by the Department for this use. The Department has the final authority to approve a proposed ILF mitigation project.

E. Project Implementation

The approved ILF sponsor will be required to provide the necessary personnel, equipment, and materials to implement ILF wetland projects. If a project has received approval for funding in its entirety, land acquisition and initial physical and biological improvements must be initiated within one year after receiving Mitigation Council approval and a signed agreement for the project.

If a project has received "seed" money only, the results of engineering, survey and hydrological studies must be completed within six months of a receiving Mitigation Council approval and a signed agreement.

If funding will be obtained through the sale of advance credits, the project must be initiated within three full growing seasons of receiving approval unless the Department and the Council determine that more time is needed to plan and implement a project based on having insufficient funds.

F. Monitoring

Monitoring of the mitigation project is necessary to determine if the project is meeting its performance standards and trending towards success as described in 33CFR 332.6. Each project-specific mitigation plan will include a monitoring plan that will meet the requirements of N.J.A.C. 7:7A-15.16.

V. Management

The ILF entity shall be responsible for maintaining the ILF projects, consistent with the terms in the approved mitigation plan, until the performance standards have been achieved and the Department has provided a mitigation complete letter.

A. Site Protection

As part of the required information for approval of an ILF project, the ILF entity shall provide a draft conservation restriction and identify the organization which will become the long-term steward of the property. The form of the conservation restriction will be provided by the Department and shall name the Department as the easement holder (see Appendix 6). The ILF entity shall be responsible for developing and implementing a long-term protection plan for each ILF project in accordance with terms described in 33 CFR 332.7(a). The Department will ensure that long-term protection mechanisms are in place prior to project implementation. An easement endowment may be established to pay for the annual monitoring and any necessary enforcement of the easement. The easement endowment will be held in a designated account.

Long-term stewards of the properties must be government or non-profit agencies.

The Department will require a conservation restriction that prohibits incompatible uses that might otherwise jeopardize the objectives of the compensatory mitigation project. If a restriction was already placed, for example, when the site was acquired through the Green Acres program,

additional restrictions may not be required if the existing restriction provides the same level of protection or greater than a mitigation restriction.

Upon approval of a specific project and before any work occurs on the site, the conservation restriction shall be filed with the appropriate county clerk.

B. Sustainability

Each ILF project will be designed, to the maximum extent practical, to require little or no long-term management per the terms described in 33 CFR 332.7(b). This includes minimization of active engineering features and appropriate siting to ensure that natural hydrology and landscape context will support long-term sustainability.

C. Adaptive Management

If the annual monitoring findings indicate that the ILF project is not making expected progress towards meeting the performance standards, the ILF sponsor shall notify the Department as soon as possible as detailed in the terms described in 33 CFR 332.7(c)(1). Likewise, if the Department determines that the project is not making expected progress towards meeting the performance standards, the Department will work with the in lieu fee sponsor to determine appropriate adaptive management steps necessary to meet the performance standards. Measures may include, but are not limited to, site modifications, design changes, and invasive plant species and animal control. Performance standards and monitoring requirements may be revised based on adaptive management measures necessary to address deficiencies and ensure project success. Performance standards may also be revised to reflect changes in management strategies if the new performance standards ensure that ecological benefits are comparable or superior to those detailed in the original mitigation plan. No other revisions to performance standards will be allowed except in the case of natural disasters per the terms detailed in 33 CFR 332.7(c) (4).

D. Long-term Management

Project-specific mitigation plans will include a long-term management plan. The long-term management plan will have a description of any anticipated management needs and projected cost estimates. A portion of the credit sales to be determined by the ILF sponsor in discussion with the Department and the long-term manager shall be placed in an escrow account to ensure that funds will be available for long-term management. The long-term manager will be identified in the project-specific mitigation plan.

E. ILF Project Closure

After the end of the designated monitoring period, when the performance standards have been met and approved by the Department and all credits have been sold, the Department shall issue a written Mitigation Complete letter to the in lieu fee sponsor. The ILF sponsor may request that an ILF project be closed early (before all credits are sold) if performance standards have been substantially achieved. The Department shall decide whether to grant such requests. If the project is closed and there are still credits available to sell, the credits will be forfeited.

Once the ILF project is closed, the long-term management period will commence and the designated long-term manager will assume responsibility for the site. If there are remaining funds in the project account associated with the particular ILF project, these funds will be released. The released funds may be used by the ILF sponsor to implement restoration projects within that respective service area or be used within a different ILF program service area subject to approval by the Department.

VI. Credit Accounting

A. Advance Credits

As noted in III(B) above, selling "advance credits" may only become necessary when there is no money remaining in the Mitigation Fund for a particular service area. When all Mitigation Funds have been exhausted for a service area, and upon approval of the ILF Instrument, the ILF sponsor will be permitted to sell a designated number of advanced wetland credits in order to raise money to begin the implementation of the project. The number of advance credits available will be determined as part of the review and consideration of the project and in accordance with the Federal rules at 33 CFR 332.8(n) and may consider historical impacts based on data the Department has compiled with the Wetlands Mitigation Council. (Appendix 7).

B. Determining Credits

The number of credits generated for each ILF project will be based on the size and scope of the ILF project and the amount of functional uplift or ecological improvement generated by the project per the terms described in 33 CFR 332.8(o). The amount of wetland credits shall be determined using the same ratios currently used for stand-alone and mitigation banking projects (see Appendix 8). The Department, in coordination with the ILF sponsor, will determine the credit ratio for each project.

C. Transition Area Credits

Transition areas will be required as part of the mitigation project. Credit may be provided for those buffers based on site specific conditions. Preservation of existing wetlands and/or uplands that support a significant population of rare plant or animal species, or that support a rare habitat type, may be proposed to generate credits. Credits generated for preservation will be determined in accordance with the terms described in 33 CFR 332.3(h, i) and 33 CFR 332.8(o) 6, 7.

D. Cost of Credits

The credit fee will be determined by the ILF sponsor and will be based on full cost accounting. The credit fee covers project expenses for site identification, land acquisition, mitigation plan development, permitting, construction, land protection, land protection endowment fee, performance monitoring, contingency measures for adaptive management, long-term management endowment, financial assurances, legal fees, an administrative fee, and any other factors as deemed necessary by the ILF sponsor. The credit fee must take into account

contingency costs appropriate to the stage of project planning, including uncertainties in construction and real estate expenses. The credit fees vary by service area based on expected land costs and other factors. The ILF sponsor will evaluate credit fees on an annual basis (by end of calendar year). Fees may be adjusted as deemed necessary to reflect the full cost accounting of operating an ILF program.

The ILF sponsor may receive an administrative fee of up to 15% per credit fee or per the Council grant funding amount. The in lieu fee sponsor will be required to justify the administrative fee percentage by providing an accounting of the anticipated expenses to be covered by the fee they are requesting. The administrative fee will be deducted when payment is received and deposited into the ILF Program account. The administrative fee may be used to offset expenses associated with program administration which includes managing credit sale transactions, annual reporting, accounting, marketing, education and training, and other activities not related to project implementation.

E. Credit Release Schedule

Release of credits must be tied to performance-based milestones such as permitting, site protection, construction, planting, and/or establishment of plant and animal communities. When determining the credit release schedule, factors to be considered may include, but are not limited to the type of ILF project (that is, creation, restoration, enhancement, and preservation), the likelihood of success, the complexity of the project, and the aquatic resource type(s) and function(s) to be provided by the ILF project. The terms of the credit release schedule will be proposed in each mitigation plan. The Department in consultation with the ILF will determine the approved credit release schedule, including the percentage of credits released after full achievement of performance standards. A framework for credit release related to creation, restoration, and enhancement projects is detailed in the following schedule:

- 10% upon signing the ILF instrument, securing all construction permits, posting adequate financial assurance and completing the conservation restriction or easement and establishing the agreement providing for transfer of the site at completion;
- Up to 20% upon establishment of the approved hydrologic regime;
- Up to 10% upon planting completion;
- Up to 20% when monitoring indicates that year one performance standards have been met;
- Up to 10% when monitoring indicates that year two performance standards have been met;
- Up to 10% when monitoring indicates that year three performance standards have been met;
- Up to 10% when monitoring indicates that year four performance standards have been met;
- The final 10% when monitoring indicates that year five performance standards have been met.

The Department will determine with the ILF sponsor when credit release is appropriate for land preservation components of projects.

If the ILF project does not meet designated milestones or achieve the performance-standards detailed in the mitigation plan, the Department may modify the credit release schedule or reduce the number of credits eligible for release.

F. Use of Credits

All activities authorized by Department Freshwater Wetlands Protection Act permits (assumed areas only) and other activities including enforcement actions will be eligible to use the ILF sponsor as compensatory mitigation. Credits will be sold on a one credit for one acre of impact basis. Upon approval by the Department through the permit review process, the permittee may present their monetary contribution to the Council which will review the appropriateness of the contribution and then direct the applicant to an approved ILF sponsor to purchase the necessary credits. The responsibility to provide compensatory mitigation remains with the permittee until payment is received. The ILF sponsor assumes the legal responsibility for compensation requirements once the permittee purchases credits and transfers payment to the ILF sponsor. Credit sales are subject to availability. Credits can only be sold one time.

G. Credit Transaction Notification

The ILF sponsor must submit a signed and dated Credit Sale letter electronically to the Department within 30 days of receiving payment from the permittee. The Credit Sale letter must be signed by the ILF sponsor and the permittee and dated. The Credit Sale letter must include the permit number(s) for which the ILF manager is accepting fees, the number of credits being purchased, and resource type(s) of credits being purchased, if applicable. A copy of each Credit Sale letter will be retained by the ILF sponsor as part of the administrative and accounting records. Credit sales will be reflected in annual accounting reports submitted to the Department in accordance with Section VII below.

VII ILF Program Accounting and Reporting

Upon Department approval of the ILF program, the ILF sponsor will establish an ILF Program Account. The Program Account will be held at a financial institution that is a member of the Federal Deposit Insurance Corporation. Interest that accrues from the program account will be applied towards the management of the ILF program. Funds for the operation of the ILF program and project development may be obtained from other sources and repaid as credits are sold. As part of the overall Program Account, sub accounts will be established for each service area (if appropriate). The sub accounts will track deposits from the sale of credits and expenses associated with implementing ILF projects. In service areas where the ILF sponsor has met all the mitigation obligations associated with specific credit sales, the ILF sponsor may use any remaining funds to establish mitigation projects within the same or in a different ILF service area in advance of a credit sale or remaining funds may be used for conservation projects within the same or different service area subject to approval by the Department.

The ILF sponsor will maintain a system for tracking the production of credits, credit transactions, and financial transactions separated for each project within the respective service area. The ILF sponsor will submit an Annual Accounting to the Department no later than March

31st of each year and will include program data from the previous calendar year (January 1 – December 31). The Annual Report will include the following documents: summary sheet, income statement, expense statement, credit report summary, and the detailed credit report.

VIII. Modifications of ILF Instrument

The ILF Instrument may not be modified except by written agreement between the ILF sponsor and the Department. Instrument modifications, including the addition or expansion of ILF projects will generally follow the process outlined above except that a streamlined modification review process may be used for changes reflecting adaptive management of the ILF program, credit releases, changes in credit releases, and credit release schedules, and changes that the Department determines are not significant.

IX. Other Provisions

Provision of Legal Responsibility

The legal responsibility for providing compensatory mitigation lies with the permittee until the permittee purchases credits from the ILF program. The transfer of liability from the permittee to the ILF sponsor is established by the submission of a credit sale letter signed by the ILF sponsor and the permittee and the transfer of fees from the permittee to the ILF sponsor. The ILF sponsor will assume the responsibility for all aspects of mitigation until the Project Closure Certification letter is issued. Upon the issuance of the Project Closure Certification letter, the ILF sponsor may transfer long-term management to a pre-identified and approved government or non-profit entity.

Default

If the Department determines that the ILF sponsor is in material default of any provision of the Instrument or an approved mitigation plan, the Department may take appropriate action. Such actions may include, but are not limited to, suspending credit sales, decreasing available credits, directing funds to alternate locations, taking enforcement actions or terminating the Instrument. In the event that the ILF program is terminated, the Department is responsible for fulfilling any remaining obligations for credits sold.

Instrument Closure Provisions

Closure procedures for the ILF Instrument may proceed within thirty (30) days upon written notification by the Department or the ILF sponsor. In the event that the ILF program is closed, the ILF sponsor is responsible for fulfilling any remaining obligations for credits sold prior to closure unless the obligation is specifically transferred to another entity as agreed between the Department and the ILF sponsor. The ILF sponsor shall be reimbursed from the ILF program account for all costs incurred in fulfilling the remaining obligations.

Any excess funds remaining in the Program account after the mitigation obligations are satisfied must be used for the rehabilitation, enhancement, establishment and and/or preservation of aquatic resources and associated upland buffers within the service area in which the funds reside.

The Department may direct the ILF sponsor to use these funds to purchase credits from another source of third-party mitigation, or disburse funds to a governmental or non-profit natural resource management entity willing to undertake further compensation activities.

Force Majeure

The ILF sponsor or a grantee will not be responsible for ILF project failure that is attributed to natural catastrophes such as flood, fire, drought, or regional pest infestation that the Department determines is beyond the reasonable control of the ILF to prevent or mitigate. The ILF sponsor shall bear the burden of demonstrating that the Force Majeure event was caused by circumstances beyond the control of the ILF sponsor and the damage is irreparable by any practical and reasonable means. The Department has sole reasonable discretion to determine whether an event is a Force Majeure.

Dispute Resolution

If there is a dispute between the ILF sponsor and the Department, the Department may request assistance from the New York District or Philadelphia District Interagency Review Teams to informally advise the Department on the issue in dispute. Resolution of disputes related to overall program management or as it pertains to individual ILF projects, for example, satisfaction of performance standards, will be resolved between the Department and the ILF sponsor.

Validity of the Instrument

This Instrument will become valid on the latter date of the signature of the ILF and the Department. This Instrument may only be amended or modified with the written approval of the ILF and the Department.

Notice

Any notice required or permitted hereunder shall be deemed to have been given either (i) when delivered by hand, or (ii) three (3) working days following the date deposited in the United States mail, postage prepaid, by registered or certified mail, return receipt requested, or (iii) sent by Federal Express or similar next day nationwide delivery system, addressed as follows (or addressed in such other manner as the party being notified shall have requested by written notice to the other party):

DEP Division of Land Use Regulation
Mitigation Section
P.O. Box 420, Mail Code 501-02A
Trenton, NJ 08625-0420

ILF Sponsor contact info

Invalid Provisions

In the event that one or more of the provisions contained in this Instrument were developed inadvertently or with malicious intent and found to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality or unenforceability will not affect any other provisions hereof, and this Instrument shall not be construed as invalid, illegal, or unenforceable.

Headings and Captions

Any paragraph heading or captions contained in this Instrument shall be for convenience of reference only and shall not affect the construction or interpretation of any provisions of this Instrument.

Binding

An ILF Instrument shall be binding upon the ILF sponsor and its successors, assignees and legal representatives upon signing by the ILF sponsor and the Department.

Liability of Regulatory Agencies

The Department that administers programs to protect wetlands and waterways and serve the public's interest will not guarantee the availability of credits to any entity, or ensure the financial success of the ILF program bank, specific individuals, or entities. The public should not construe this Instrument as a guarantee in any way that the IRT sponsor will approve sale of credits from the ILF program, or that the regulatory agencies will forgo other mitigation options that may also serve the public interest.

List of Appendices

1. Assumed/Unassumed Waters
- 2A. Map of New Jersey Watersheds
- 2B. Map of New Jersey Eco regions
- 2C. Map of New Jersey ILF Service Areas
3. Table of Eco region with outstanding Mitigation needs and funds available.
4. Mitigation Banking Checklist
5. State Mitigation Banking Instrument Template
6. Mitigation Conservation Restriction
7. History of Mitigation Impacts using Mitigation Council/In Lieu Fee option
8. Mitigation ratios